

1
2
3
4
5
6
7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 KISCHE USA LLC,

11 Plaintiff,

12 v.

13 ALI SIMSEK, et al.,

14 Defendants.

CASE NO. C16-0168JLR

ORDER GRANTING MOTION
TO AMEND

15 **I. INTRODUCTION**

16 Before the court is Plaintiff Kische USA LLC's ("Kische") second motion for
17 leave to amend its complaint. (2d MTA (Dkt. # 66).) The court has reviewed the motion,
18 Defendants Ali Simsek, Diane Walker, and JD Stellar LLC's ("JD Stellar") (collectively,
19 "Stellar Defendants") opposition to the motion (Resp. (Dkt. # 68)), Kische's reply (Reply

20 //

21 //

22 //

(Dkt. # 69)), the relevant portions of the record, and the applicable law. Being fully advised,¹ the court GRANTS Kische's motion for the reasons set forth below.

II. BACKGROUND

On February 4, 2016, Kische brought this suit against Mr. Simsek, Ms. Walker, attorney Kevin Costanza,² their respective marital communities, and JD Stellar. (*See* Compl. (Dkt. # 1) at 1.) Against Stellar Defendants, Kische originally alleged (1) unfair competition under the Lanham Act; (2) false description under the Lanham Act; (3) common law passing off; (4) common law misappropriation of trade secrets; (5) violation of Washington's Uniform Trade Secrets Act ("UTSA"), RCW ch. 19.108; (6) "common law injury to business reputation"; (7) breach of contract; (8) breach of fiduciary duty; (9) intentional interference with contractual relations; (10) conversion; (11) business opportunity fraud under RCW ch. 19.110; and (12) violation of the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68. (*Id.* at 12-19.) Against Mr. Costanza, Kische alleged legal malpractice based on theories of negligence and breach of fiduciary duty. (*Id.* at 19-20.)

All of the initial defendants moved to dismiss the original complaint for failure to state a claim (1st Stellar MTD (Dkt. # 18); 1st Costanza MTD (Dkt. # 28)), and the court

¹ No party requested oral argument, and the court finds that oral argument would not be helpful to its disposition of the motion. *See* Local Rules W.D. Wash. LCR 7(b)(4).

² The court dismissed Kische's claims against Mr. Costanza with prejudice with the exception of Kische's civil conspiracy claim. (12/13/16 Order (Dkt. # 65) at 43.) However, Kische's proposed amended complaint does not include any claims against Mr. Costanza. (*See* 2/3/17 Filing (Dkt. # 72), Ex. A ("Prop. SAC").)

1 granted in part and denied in part Stellar Defendants' motion to dismiss and granted Mr.
2 Costanza's motion to dismiss (6/29/16 Order (Dkt. # 39)). Specifically, the court
3 dismissed all of Kische's claims except for breach of contract, breach of fiduciary duty,
4 and tortious interference. (*Id.* at 18, 22.) The court's dismissal was without prejudice
5 because the court concluded that "[t]hough Kische has not plausibly pleaded many of its
6 claims, the court cannot say on the record before it that leave to amend would be futile or
7 that any other relevant factors weigh against granting leave to amend." (*Id.* at 31.)

8 Despite already having the court's leave to amend, on July 19, 2016, Kische filed
9 a motion to amend its complaint. (*See* 1st MTA (Dkt. # 42).) Kische sought to amend its
10 complaint "with additional claims, case law[,] and facts to substantiate [Kische's] claims
11 against Defendants." (*Id.* at 1.) Kische argued that "[s]ome facts and law were not
12 originally included in the verified complaint, and, because of this, the [c]ourt was not
13 able to find facts sufficient to support multiple claims as stated." (*Id.* at 2.) Kische
14 further stated that it knew some of those "new" facts at the time it filed its first complaint,
15 while it became aware of other "new" facts during discovery. (*Id.*) Kische also stated
16 that it omitted from its proposed amended complaint "claims for which there may be
17 insufficient corroborating evidence." (*Id.* at 2; *see also id.* at 4 (stating that Kische
18 omitted its RICO claim).) None of the defendants opposed Kische's first motion for
19 leave to amend. (Costanza Resp. to 1st MTA (Dkt. # 48); Stellar Resp. to 1st MTA (Dkt.
20 # 51).)

21 The court permitted Kische to file its proposed amended complaint. (*See* 8/1/16
22 Order (Dkt. # 52); Am. Compl. (Dkt. # 53).) In its amended complaint, Kische asserted

12 causes of action—10 against Stellar Defendants and three against Mr. Costanza. (Am. Compl.) Against Mr. Costanza, Kische alleged legal malpractice on a negligence theory, breach of fiduciary duty, and civil conspiracy. (*Id.* ¶¶ 14.1-14.6, 15.1-15.4.) Against Stellar Defendants, Kische alleged (1) a trademark infringement claim under the Lanham Act; (2) a false advertising claim under the Lanham Act; (3) a trademark dilution claim under the Lanham Act; (4) violation of Washington’s Consumer Protection Act (“CPA”), RCW ch. 19.86; (5) breach of contract; (6) breach of fiduciary duty; (7) tortious interference with business relations; (8) conversion; (9) fraud; and (10) civil conspiracy. (*Id.* ¶¶ 5.1-13.10, 15.1-15.4.)

All of the defendants then again moved to dismiss Kische’s amended complaint, with the exception of the claims that survived Defendants’ first motions to dismiss. (*See* 2d Costanza MTD (Dkt. # 54); 2d Stellar MTD (Dkt. # 56).) The court dismissed without prejudice Kische’s claims against Stellar Defendants for trademark infringement of the Marseille and Dantelle marks, false advertising, trademark dilution, violation of the CPA, fraud, and civil conspiracy, but the court declined to dismiss Kische’s claims for breach of fiduciary duty and conversion. (*See* 12/13/16 Order at 43.) The court also dismissed Kische’s claims against Mr. Costanza: the legal malpractice and breach of fiduciary claims with prejudice, and the civil conspiracy claim without prejudice. (*Id.* at 43-44.)

In the second order of dismissal, the court stated that the scope of the court’s leave to amend was limited and that “Kische may not add claims” to an amended complaint without first obtaining the court’s leave. (*Id.* at 43.) The court ordered Kische to file any

1 second amended complaint no later than January 3, 2017. (*Id.*)

2 Rather than filing a second amended complaint within the scope of the court's
3 December 13, 2016, order, Kische filed a second motion to amend its complaint. (*See* 2d
4 MTA.) In doing so, Kische failed to comply with Local Civil Rule 15, which requires a
5 party moving to amend its complaint to "indicate on the proposed amended pleading how
6 it differs from the pleading that it amends by bracketing or striking through the text to be
7 deleted and underlining or highlighting the text to be added." Local Rules W.D. Wash.
8 LCR 15. Accordingly, the court ordered Kische to file a proposed amended complaint
9 that complied with Local Civil Rule 15. (2/3/17 Order (Dkt. # 70).) Kische filed a
10 proper proposed amended complaint the same day. (Prop. SAC.) The court now
11 addresses Kische's second motion to amend.

12 **III. ANALYSIS**

13 **A. Legal Standard**

14 Federal Rule of Civil Procedure 15 (a)(2) requires the court to "freely give" leave
15 to amend a pleading "when justice so requires." Fed. R. Civ. P. 15(a)(2). This policy is
16 "applied with extreme liberality." *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d
17 708, 712 (9th Cir. 2001); *see also DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186
18 (9th Cir. 1987); *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981). It is within the
19 court's discretion whether to grant or deny leave to amend. *See Webb*, 655 F.2d at 979.
20 "In exercising this discretion, a court must be guided by the underlying purpose of Rule
21 15 to facilitate a decision on the merits, rather than on the pleadings or technicalities."
22 *Id.* Accordingly, the court analyzes five factors in ruling on a motion for leave to amend:

(1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment, and (5) whether the party has previously amended its pleading. *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962). The party opposing the motion to amend bears the burden of showing that leave to amend should be denied. *See Wizards of the Coast LLC v. Cryptozoic Entm't LLC*, 309 F.R.D. 645, 649 (W.D. Wash. 2015).

B. Kische's Motion to Amend

Kische seeks leave to further amend its complaint to “include additional” facts and to “clarify existing facts.” (2d MTA at 2.) The sole legal authority Kische cites is as follows: “This motion is made pursuant to the [c]ourt’s December 13, 2016[,] Order on Motion[s] to Dismiss, and FRCP 15(a)(2), stating that Plaintiff may amend its pleading with the [c]ourt’s leave, and that [the c]ourt should freely give leave when justice so requires.” (*Id.* at 3.) Kische seeks to add or change certain factual allegations and to allege claims of common law trademark infringement, common law unfair competition, and unjust enrichment. (*See Prop. SAC.*)

Stellar Defendants oppose Kische’s motion. (*See Resp.* at 2.) Specifically, Stellar Defendants oppose Kische “being granted leave to amend the complaint to include these new causes of action, on the basis that [Kische] was expressly instructed not to include new causes of action in its Second Amended Complaint and the undue time and expense it adds.” (*Id.* at 3.) Stellar Defendants argue that “[i]n addition to mischaracterizing this [c]ourt’s ruling, [Kische] offers nothing in the way of an explanation as to why it should be granted leave to add new causes of action.” (*Id.* at 4.) In opposing Kische’s motion,

1 Stellar Defendants do not address the Rule 15 factors. (*See id.* at 2-5.) Stellar
 2 Defendants also ask that the court “instruct [Kische’s] counsel that Defendants will be
 3 awarded their attorney’s fees for future instances that they are forced to seek dismissal
 4 and/or strike new causes of action, as these new causes of action needlessly prolong the
 5 litigation and add great expense for Defendants.” (*Id.* at 6.)

6 In short, Stellar Defendants’ primary argument against amendment is that the
 7 scope of Kische’s proposed amendment exceeds the leave the court granted in its
 8 December 2016 order. (*See id.* at 2-5; 12/13/16 Order.) However, Kische has moved for
 9 leave to amend its complaint beyond what the court allowed at that time, and the court
 10 now analyzes Kische’s motion pursuant to the factors outlined above.³

11 1. Bad Faith

12 Bad faith “implies the conscious doing of a wrong because of dishonest purpose or
 13 moral obliquity.” *Wizards of the Coast*, 309 F.R.D. at 651 (internal quotation marks
 14 omitted). In the context of a motion for leave to amend, “bad faith” means acting with
 15 intent to deceive, harass, mislead, delay, or disrupt. *Id.* (citing *Leon v. IDX Sys. Corp.*,
 16 464 F.3d 951, 961 (9th Cir. 2006)). Here, there is no indication—either in the record or

17
 18 ³ The court does not consider arguments that a moving party raises for the first time in a
 19 reply brief. *See Coos Cty. Bd. of Comm’rs v. Kempthorne*, 531 F.3d 792, 812 n.16 (9th Cir.
 20 2008); *Lucas v. Bell Transp.*, 773 F. Supp. 2d 930, 939 n.2 (D. Nev. 2011); *Best Western Int’l,*
 21 *Inc. v. AV Inn Assocs. I, LLC*, No. CV-08-2274-PHX-DGC, 2010 WL 2789895, at *3 (D. Ariz.
 22 July 14, 2010) (“Both district courts and the Ninth Circuit have regularly held that arguments
 made for the first time in a reply brief should not be considered.”). The court adheres to this rule
 because “[a]rguments raised for the first time in reply deprive the opposing party of its chance to
 respond.” *Just Enters., Inc. v. Phillips & Webster, PLLC*, No. C07-1622RSL, 2008 WL 351020,
 at *3 n.4 (W.D. Wash. Feb. 7, 2008). Here, in its reply, Kische for the first time articulates
 specific reasons why it should be allowed to amend its complaint to add new claims. (*See*
Reply.) The court declines to consider those arguments.

1 in Stellar Defendants’ response—that Kische acted in bad faith by seeking to amend its
2 complaint. (*See generally* Resp.) For this reason, the court finds that this factor supports
3 granting Kische leave to amend.

4 2. Undue Delay

5 “Undue delay” is delay that prejudices the nonmoving party or imposes
6 unwarranted burdens on the court. *Davis v. Powell*, 901 F. Supp. 2d 1196, 1212 (S.D.
7 Cal. 2012). In assessing whether there is undue delay, it is not sufficient merely to ask
8 whether the motion to amend complies with the court’s scheduling order.
9 *AmerisourceBergen Corp. v. Dialysist West, Inc.*, 465 F.3d 946, 953 (9th Cir. 2006).
10 Instead, a district court must inquire whether the moving party knew or should have
11 known the facts and theories raised by the amendment at the time of the original
12 pleading, *id.*, although delay alone is not an adequate basis for denying leave to amend,
13 *In re Tracht Gut, LLC*, 836 F.3d 1146, 1155 n.4 (9th Cir. 2016). Whether there has been
14 “undue delay” should be considered in the context of (1) the length of the delay measured
15 from the time the moving party obtained relevant facts; (2) whether discovery has closed;
16 and (3) proximity to the trial date. *See Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 798-99
17 (9th Cir. 1991).

18 To the extent Kische has delayed in amending its complaint with new facts,
19 theories, or claims, the court does not find that delay “undue.” Kische’s motion to amend
20 comes before the close of discovery, and trial is still over six months away. (*See* Sched.
21 Order (Dkt. # 34) at 1.) In addition, although Stellar Defendants argue that Kische is
22 trying to “take another shot” at asserting a common law unfair competition claim (Resp.

1 at 5), the record contains no indication that Kische knew of the facts supporting that
2 claim earlier in this litigation (*see generally id.*; Dkt.). Indeed, the opposite is likely true
3 because the court dismissed Kische’s unfair competition claim under the Lanham Act
4 because Kische’s factual allegations did not rise above mere speculation. (6/29/16 Order
5 at 6-10.) Further, even if Kische knew or should have known of additional factual
6 allegations or of its common law trademark infringement, common law unfair
7 competition, and unjust enrichment claims at the time it filed its original complaint,
8 Stellar Defendants have not met their burden of showing that any delay in amendment
9 has unduly prejudiced them. *See Davis*, 901 F. Supp. 2d at 1212. For these reasons, this
10 factor favors allowing amendment.

11 3. Prejudice

12 Of the factors a court considers in determining whether leave to amend is
13 appropriate, “prejudice to the opposing party . . . carries the greatest weight.” *Eminence*
14 *Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). Prejudice means
15 “undue difficulty in prosecuting a lawsuit as a result of a change in tactics or theories on
16 the part of the other party.” *Wizards of the Coast*, 309 F.R.D. at 652. The non-moving
17 party must do more than merely assert prejudice; “it must show that it was unfairly
18 disadvantaged or deprived of the opportunity to present facts or evidence.” *Bechtel v.*
19 *Robinson*, 886 F.2d 644, 652 (3d Cir. 1989) (internal quotation marks omitted); *see also*
20 *Davis v. Astrue*, 250 F.R.D. 476, 482 (N.D. Cal. 2008) (finding prejudice where the
21 plaintiff had “twice previously amended his complaint” because “repeated amendments
22 to the complaint require the [defendant] to expend time and resources in drafting

1 responses”). The burden is on the party opposing amendment to demonstrate that it will
2 be prejudiced by the proposed amendment. *Leighton*, 833 F.2d at 187.

3 Stellar Defendants oppose allowing Kische to amend its complaint a second time
4 because of “the undue time and expense it adds to what has turned into very lengthy and
5 costly litigation.” (Resp. at 3.) Stellar Defendants have filed two motions to dismiss—
6 one to dismiss Kische’s original complaint and one to dismiss Kische’s first amended
7 complaint. (Stellar Defs. 1st MTD; Stellar Defs. 2d MTD.) Although it may be
8 appropriate for a court to deny leave to amend where a party has repeatedly amended its
9 complaint because the repeated amendments prejudice the defendant, *see Davis*, 250
10 F.R.D. at 482, the court finds that Stellar Defendants have not met their burden of
11 demonstrating prejudice here. First, Stellar Defendants state only that further amendment
12 would add “undue time and expense” to this litigation. (Resp. at 3.) This vague,
13 conclusory statement is insufficient to meet their burden of demonstrating prejudice. *See*
14 *Wizards of the Coast*, 309 F.R.D. at 652. In addition, Kische has previously amended its
15 complaint only once (*see Am. Compl.*), and Stellar Defendants have not shown that
16 amendment would unfairly disadvantage them or deprive them of the opportunity to
17 mount a defense, *see Bechtel*, 886 F.2d at 652. For these reasons, the court finds that
18 Stellar Defendants’ claim of prejudice is too tenuous to support denying Kische leave to
19 amend.

20 4. Futility

21 A court may deny leave to amend where amendment will be futile. For purposes
22 of this analysis, an amendment is “futile” if it is clear that the complaint could not be

1 saved by amendment. *See United States v. Corinthian Colls.*, 655 F.3d 984, 995 (9th Cir.
2 2011). Specifically, the court must determine whether the deficiencies in the pleadings
3 “can be cured with additional allegations that are ‘consistent with the challenged
4 pleading’ and that do not contradict the allegations in the original complaint.” *Id.* “A
5 party should be afforded an opportunity to test his claim on the merits rather than on a
6 motion to amend unless it appears beyond doubt that the proposed amended pleading
7 would be subject to dismissal.” *Mahone v. Pierce Cty.*, No. C10-5847 RLB/KLS, 2011
8 WL 2009740, at *2 (W.D. Wash. May 23, 2011) (citing *Roth v. Garcia Marquez*, 942
9 F.2d 617, 629 (9th Cir. 1991)).

10 Here, Kische seeks to add factual allegations and claims for common law
11 trademark infringement, common law unfair competition, and unjust enrichment to its
12 complaint. (*See Prop. SAC.*) Based on the record before it, the court cannot conclude
13 that allowing Kische to amend its complaint in this manner would be futile. As an initial
14 matter, Stellar Defendants do not argue that Kische’s proposed amendment is futile. (*See*
15 *generally Resp.*) In addition, Washington law recognizes causes of action for all three
16 claims that Kische seeks to add. *See Seattle Endeavors, Inc. v. Mastro*, 868 P.2d 120,
17 124-25 (Wash. 1994) (stating the elements of a common law trademark infringement
18 claim); *Univera, Inc. v. Terhune*, No. C09-5227RBL, 2010 WL 3489932, at *6-7 (W.D.
19 Wash. Aug. 31, 2016) (addressing a common law unfair competition claim as a “passing
20 off” claim); *Norcon Builders, LLC v. GMP Homes VG, LLC*, 254 P.3d 835, 844 (Wash.
21 Ct. App. 2011) (listing the elements of an unjust enrichment claim). Finally, it does not
22 appear that the factual allegations Kische intends to add would undermine any of its

1 claims. Accordingly, the court finds that this factor weighs in favor of granting Kische
2 leave to amend.

3 5. Previous Amendment

4 The court also considers whether the moving party has had previous opportunities
5 to amend its pleadings. *See Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160
6 (9th Cir. 1989) (“The district court’s discretion to deny leave to amend is particularly
7 broad where plaintiff has previously amended the complaint.”). A plaintiff does not
8 enjoy unlimited opportunities to amend its complaint, *McHenry v. Renne*, 84 F.3d 1172,
9 1174 (9th Cir. 1996) (affirming the dismissal of a complaint where the plaintiffs had
10 amended their complaint three times), and the court may deny leave to amend when a
11 party repeatedly fails to cure deficiencies, *Ryan v. Microsoft Corp.*, 147 F. Supp. 3d 868,
12 896-97 (N.D. Cal. 2015) (denying leave to amend and dismissing with prejudice where
13 the plaintiff failed to cure previous deficiencies in the complaint and additional
14 amendment would require the defendant to “file repeated motions to dismiss”).

15 The court finds that this factor counsels slightly in favor of denying Kische leave
16 to amend because the court has already granted Kische an opportunity to amend its
17 complaint and Stellar Defendants have filed two motions to dismiss. (*See* 8/1/16 Order;
18 1st Stellar MTD; 2d Stellar MTD.) However, the court finds that this factor alone is not
19 dispositive on the facts of this case. *See Tyson v. Or. Anesthesiology Grp., P.C.*, No. 03-
20 1192-HA, 2007 WL 1731475, at *4 (D. Or. June 13, 2007) (noting that no one of these
21 five factors is dispositive in ruling on a motion to amend). Although the court noted in its
22 December 13, 2016, order that it was unlikely to look favorably on Kische seeking to

1 amend its complaint to state entirely new causes of action (12/13/16 Order at 43; *see also*
2 Resp. at 3), the other four factors weigh in favor of granting leave to amend, particularly
3 because Kische has previously amended its complaint only once (*see supra* §§ III.B.1-4;
4 Am. Compl.).

5 For the reasons set forth above, the court grants Kische leave to amend its
6 complaint consistent with its proposed amended complaint. (*See* 2d MTA; Prop. SAC.)
7 The court denies Stellar Defendants' request that the court award them attorney's fees for
8 any future motions to dismiss or motions to strike allegations or claims. (Resp. at 6.)
9 The court will entertain such a request if it arises in the context of a future motion.

10 **C. The Expectations of the Court**

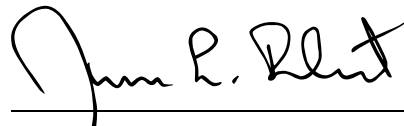
11 Finally, the court reiterates its concern with Kische's conduct in this litigation.
12 (*See, e.g.*, 12/13/16 Order at 43.) Although the court is bound to apply Rule 15's policy
13 favoring amendment with "extreme liberality," *Owens*, 244 F.3d at 712, and Stellar
14 Defendants did not meet their burden of demonstrating why Kische should be denied
15 leave to amend, *see Wizards of the Coast*, 309 F.R.D. at 649 (stating that the party
16 opposing amendment bears the burden of showing that amendment should be denied), the
17 court will not give Kische unlimited opportunities to add factual allegations and plead
18 new causes of action, *see Ryan*, 147 F. Supp. 3d at 896-97 (denying leave to amend and
19 dismissing with prejudice where the plaintiff failed to cure previous deficiencies in the
20 complaint and defendant would be prejudiced by having to "file repeated motions to
21 dismiss"). Further, the court expects Kische to carefully read and comply with all of the
22 court's orders. (*See, e.g.*, 12/13/16 Order at 7-8 (stating that filing voluminous exhibits

1 with a complaint is generally improper).) Finally, the court continues to find that
2 Kische's counsel's standard of practice falls well below that expected of attorneys
3 practicing before this court. (*See, e.g.*, 6/29/16 Order at 6 n.2 (stating that Kische's
4 response to the first motion to dismiss fell "below the minimum standards for practice in
5 this court").) For example, in connection with the instant motion alone, Kische failed to
6 provide substantive argument in its opening brief (*see* 2d MTA) and failed to comply
7 with the Local Civil Rules for the Western District of Washington (*see* 2/3/17 Order
8 (directing Kische to file a proposed amended complaint that complies with Local Civil
9 Rule 15)). The court will consider substantial sanctions in the future, including dismissal
10 of portions of the claims, if Kische's counsel fails to heed the court's orders or to meet
11 the minimum standard of practice in this court.

12 IV. CONCLUSION

13 For the foregoing reasons, the court GRANTS Kische's motion to amend its
14 complaint (Dkt. # 66) and ORDERS Kische to file and serve its proposed amended
15 complaint (Dkt. # 72, Ex. A). Kische must file and serve its amended complaint within
16 seven (7) days of the date of this order.

17 Dated this 22nd day of February, 2017.

18
19
20 

21 JAMES L. ROBART
22 United States District Judge